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Termination of Parental Rights and the Lesser Restrictive Alternative Doctrine

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TERMINATION OF PARENTAL RIGHTS AND THE LESSER RESTRICTIVE ALTERNATIVE DOCTRINE

A parent has almost complete authority to control every aspect of his child's life. This parental right of control has been primarily justified under two theories. Under the earlier of the two, parents were understood to have inherent rights in their children similar to those in property.[1] A similar degree of control is justified under the more modern idea that maintaining the control of natural parents is usually in the best interest of a child.[2]

Despite its pervasiveness under normal conditions, almost every state has statutes under which parental rights may be terminated.[3] Basically these statutes interrupt the parental right under four different conditions: (1) divorce proceedings,[4] (2) guardianship proceedings,[5] (3) adoption proceedings[6] and (4) when the child's natural parents

1. *See, e.g.*, Roche v. Roche, 25 Cal. 2d 141, 152 P.2d 999 (1944). *See generally* Bronson, *The Law of Adoption*, 22 COLUM. L. REV. 332, 335 (1922); note 10 *infra*.

2. *See, e.g.*, Stout v. Stout, 166 Kan. 459, 464, 281 P.2d 637, 641 (1944); Ross v. Pick, 199 Md. 341, 86 A.2d 463 (1952).

3. ALASKA STAT. § 47.10.080 (1975); ARIZ. REV. STAT. § 8-538 (1974); CAL. CIV. CODE § 232 (West Supp. 1976); COLO. REV. STAT. § 19-4-101 (1973); CONN. GEN. STAT. ANN. § 17-43a (West Supp. 1977); FLA. STAT. ANN. § 39.11(1)(d) (West Supp. 1977); GA. CODE ANN. § 24A-3201 (1976); HAW. REV. STAT. § 571-61 (Supp. 1975); IDAHO CODE § 16-2005 (Supp. 1976); ILL. ANN. STAT. ch. 37, § 705-9(z) (Smith-Hurd 1972); IND. CODE ANN. § 31-3-1-7 (Burns Supp. 1976); IOWA CODE ANN. § 600A.8 (West Supp. 1976); KAN. STAT. § 38-824(c) (Supp. 1976); KY. REV. STAT. § 199.600 (Supp. 1976); ME. REV. STAT. tit. 22, § 3793 (1964); MICH. COMP. LAWS ANN. § 712A.19a (West Supp. 1976-77); MINN. STAT. ANN. § 260.221 (West Supp. 1977); MO. ANN. STAT. § 211-441 (Vernon 1959); MONT. REV. CODES ANN. § 10-1314 (Supp. 1975); NEB. REV. STAT. § 43-209 (Supp. 1976); NEV. REV. STAT. § 128.105 (1975); N.J. STAT. ANN. § 9:2-20 (West 1976); N.M. STAT. ANN. § 22-2-23 (Supp. 1975); N.Y. JUD. LAW § 634 (McKinney Supp. 1976-77); N.C. GEN. STAT. § 7A-288 (1969); N.D. CENT. CODE § 27-20-44 (1974); OHIO REV. CODE ANN. § 2151.353 (D) (1971); OKLA. STAT. tit. 10, § 1130 (Supp. 1976); OR. REV. STAT. § 419.523 (1975); R.I. GEN. LAWS § 15-7-7 (Supp. 1976); S.C. CODE § 15-1095-36 (Supp. 1974); TENN. CODE ANN. § 36-110 (Supp. 1976); TEX. FAM. CODE ANN. tit. 2, § 15.02 (Vernon Supp. 1976-77); UTAH CODE ANN. § 55-10-109 (1953); W. VA. CODE § 49-6-5(3) (1976); WISC. STAT. ANN. § 48.40 (West 1957 & Supp. 1976-77); WYO. STAT. § 14.57 (1965).

4. *E.g.*, CAL. CIV. CODE § 4351 (West Supp. 1975).

5. *E.g.*, CAL. PROB. CODE § 1405 (West Supp. 1975).

6. CAL. CIV. CODE § 229 (West 1954).

have neglected or abused him.[7] Even though interruption of the right in the last situation is instigated as well as enforced by the state, courts in neglect proceedings are seldom required to frame their orders more narrowly or exercise greater restraint than courts acting in the first three situations.[8]

The Due Process Clause of the United States Constitution seems to mandate restraint on the part of the state when the parental right is terminated in neglect proceedings unless the state's interests could be vindicated in no other way. In order to determine whether present state laws permitting termination of the parental right in neglected children are unconstitutional, this article will first examine neglect statutes and the termination process under such statutes and, secondly, the constitutional rights that those statutes may impinge. Finally, the article will suggest ways in which any constitutional infirmities can be cured.

NEGLECT AND ABUSE STATUTES

The state derives the authority to interfere with the parental right from two sources: the police power and parens patriae power. Under the parens patriae power, a state is entitled to insure the well-being of individual citizens.[9] In the case of children who are incapable of protecting themselves, this justification for state action is particularly persuasive. Thus, under a parens patriae rationale, a state justifies reducing a parent's control over his child in order to insure the welfare of that child.[10] The theory supports not only taking the child from the

7. CAL. WELF. & INST. CODE § 600 (West 1972). See Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 STAN. L. REV. 703, 706-21 (1971), for a discussion of the jurisdictional conflicts and procedural complexities created by the four separate bases for termination in California.

8. *See* text accompanying notes 9-44 *infra*.

9. *See* Mormon Church v. United States, 136 U.S. 1, 57 (1890); Hammon v. Hill, 228 F. 999 (W.D. Pa. 1915).

10. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 649 (1972) (The state has the "right and the duty to protect minor children."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 367 (1966); Note, Parens Patriae *and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745, 748 (1973).

Under Roman law, the father could sell, mutilate, kill or sacrifice his children, a prerogative thought to have been borrowed from the Greeks, who thought of children as property of the father. In the centuries that followed, the right of the government to interfere in a father's exercise of this right was gradually established. This interference was primarily justified under the parens patriae doctrine. Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293, 295-315 (1971).

The use of the *parens patriae* power to interfere with the parental right in order

custody of his natural parents, but also terminating all parental rights in the child and providing him with new parents when it is in his best interests. Under the theory that the state acts in the best interests of the child, the doctrine has also been felt to justify dispensing with many procedural rights that parties to judicial proceedings otherwise have.[11]

In contrast to the state's action in the best interests of a neglected child, interference with the parental right can also be justified under

to protect a child is commonly traced to Falkland v. Bertie, 23 Eng. Rep. 814 (Ch. 1696), where the Court of Chancery recognized that the king could serve as the *pater patriae* of every subject who was incapable of self-protection. Charities, idiots, infants and lunatics were all included in this category. *See* Eyre v. Shaftsbury, 24 Eng. Rep. 659, 664 (Ch. 1722). In *Falkland,* the court, through the king, intervened to protect the child's interest in real property over the testamentary guardian who was trying to claim the land as his own. *Parens patriae* was extended in the case of Beaufort v. Berty, 24 Eng. Rep. 579 (Ch. 1721), which again involved a testamentary guardian taking advantage of a minor child's property interest. In that case, the child was protected from third parties although the father was alive and able to protect the child. The modern form of the doctrine did not take shape until Wellesley v. Beaufort, 38 Eng. Rep. 236 (1827); *See also In re* Spence, 41 Eng. Rep. 937 (Ch. 1847) (court interfered with the natural father's right to his minor child when it appeared the father was wrongfully appropriating the child's property).

Despite the extension of the *parens patriae* doctrine in the Court of Chancery, courts of law in England continued to recognize the parent's right to the child as absolute for some time. *See* De Manneville v. De Manneville, 32 Eng. Rep. 762 (Ch. 1804). However, Parliament extended the Chancery's power to award children under 16 to the mother. The Custody of Infants Act, 36 and 37 Vict. C. 12 (1873). *See also* LEONARD, THE EARLY HISTORY OF ENGLISH POOR RELIEF (1900); Risenfeld, *The Formative Era of American Public Assistance Law*; 43 CAL. L. REV. 175 (1955). The laws were important for the furtherance of the industrial revolution. Through this act the children were placed in work shops as apprentices. Apparently both English and American courts, as well as the general public at large, supported this policy. *See* Mercein v. People, 35 Am. Dec. 653 (N.Y. 1840).

American courts never felt comfortable with the English view of absolute parental rights in the father. Chapsky v. Wood, 26 Kan. 650, 656, 657 (1881). Accordingly, the concept that the parental right was absolute never became firmly fixed in the courts or the legislatures. Although the parental right was always shown deference, it was felt a mother could take care of her child without the assistance of the father. In several important decisions, the child was actually taken away from the father and placed in the care of the mother. Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases,* 63 GEO. L.J. 887, 890 (1975). A few courts took custody away from both parents, terminated their rights, and appointed an unrelated guardian custodian of the child. *See, e.g.,* Garner v. Gordon, 41 Ind. 92 (1872); Dumain v. Gwynne, 92 Mass. 270 (1865) (custody given to a charitable institution).

The Society for the Prevention of Cruelty to Children was formed in New York City in 1874. While the majority of the Society's efforts were aimed at eradicating the horrible living conditions of poor children, rather than terminating parental rights, NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, FIRST ANNUAL REPORT 30-31 (1876), its creation reflected the changing attitude with respect to the disciplining of children; no longer were physical beatings or captivity tolerated by the public.

11. *See, e.g., In re* Gault, 387 U.S. 1 (1967), which rejected this argument in the context of a juvenile delinquency proceeding.

the police power in order to protect society at large.[12] Because a child who has been mistreated either by his parents or the state may rebel against the institutions that he feels cheated him, protection of society may require that a neglected or abused child be taken from his parents to diminish the possibility of future criminal acts.[13]

Procedures for State Interference with the Parental Right

In order to determine when the interests of children and society are in need of protection, states set standards of parental care. These standards are vague; generally, parents are required to give their children "necessary and proper" care.[14] Once a state is made aware that the care given by a parent may not fulfill these standards,[15] the allegation is investigated.[16] If it appears that the standard has been violated, the appropriate state agency files a petition for a hearing.[17] While all

12. *See, e.g.*, Kent v. United States, 383 U.S. 541, 554 (1966) ("The objectives are to provide measures of guidance and rehabilitation for the child and protection for society . . . ."); Prince v. Massachusetts, 321 U.S. 158, 165 (1944); Milwaukee Indus. School v. Supervisors, 40 Wis. 328, 337 (1876).

13. M. KADUSHIN, CHILD WELFARE SERVICES (1967).

14. *See, e.g.*, OKLA. STAT. tit. 10, § 1101(b), (c) (1971).

> (b) The term "child" in need of supervision" means any person under the age of eighteen (18) years who is habitually truant from school, or who is beyond the control of his parents, guardian or other custodian, or who habitually deports himself so as to injure or endanger the health or morals of himself or others.
>
> (c) The term "dependent or neglected child" means any person under the age of eighteen (18) years who is for any reason destitute, homeless or abandoned; or who is dependent upon the public for support; or who has not the proper parental care or guardianship; or whose home, by reason of neglect, cruelty, or depravity on the part of his parents, guardian or other person in whose care it may be, is an unfit place for such child; or who is in need of special care and treatment because of his physical or mental condition, and his parents, guardian or legal custodian is unable to provide it; or whose parent or legal custodian for good cause desires to be relieved of his custody; or who is without necessary care or support through no fault of his parents, guardian or custodian. Provided, however, no child who, in good faith, is being provided with treatment and care by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to be a dependent or neglected child under any provision of this act.

15. The state somehow must be aware of some condition which potentially is in violation of the state standard of proper parental care. Almost all states require a physician to inform the state's social services agency of any case of child mistreatment. *See, e.g.*, N.Y. SOC. SERV. LAW. § 413 (McKinney 1976). New York, like other states, provides criminal sanctions for physicians who fail to report child abuse. N.Y. SOC. SERV. LAW § 420 (McKinney 1976). *See also* KAN. STAT. § 38-720 (Supp. 1976). Most statutes permit anyone to report a suspected violation. *E.g.*, ILL. ANN. STAT. ch. 37, § 704-1 (Smith-Hurd 1972).

16. *See, e.g.*, NEV. REV. STAT. § 128.040 (1975).

17. *E.g.*, OKLA. STAT. tit. 10, § 1103 (Supp. 1976); most states require a specific form for the petition. *E.g.*, NEV. REV. STAT. § 128.050 (1975); N.Y. JUD. LAW §§ 261, 1022 (McKinney 1975) and § 614 (McKinney Supp. 1976-77).

states require that the parents be notified of the hearing, few require personal service or even the best possible notice under the circumstances.[18]

The Custody Hearing

The purpose of this initial hearing, which will be referred to as the custody hearing, is to substantiate the allegations in the welfare agency's petition,[19] and thus either justify temporarily taking the child from his parents' custody,[20] or endorse previous interference with parental custody under an emergency custody statute.[21] Even though every state provides for such a hearing, the procedural safeguards provided parents vary greatly from state to state.[22]

The appointment of counsel for parents unable to afford representation is recognized as a statutory right in all states.[23] However, despite the presence of counsel, custody hearings are not adversarial.[24] The procedure is generally formal and the rules of evidence relaxed.[25] While some states require their social welfare agency to support a custody petition by clear and convincing evidence,[26] the majority of states only require proof by a preponderance of the evidence.[27] In most states no provision is made for a jury trial.[28]

18. *E.g.*, N.Y. JUD. LAW §§ 616, 617 (McKinney 1975 & Supp. 1976-77). *Cf.* ARK. STAT. ANN. § 45-426 (Supp. 1975) (notice by publication in certain instances).

19. *E.g.* ALA. CODE tit. 13, § 352 (1958).

20. *See, e.g.*, OKLA. STAT. tit. 10, § 1137(a) (Supp. 1976) "[A] child in need of supervision" or otherwise "dependent and neglected" or even "delinquent" may, at the court's discretion, be removed from the parent.

21. *See, e.g.*, OKLA. STAT. tit. 10, §§ 1130(B), 1107(B) (1971) which provide for immediate removal of custody if a child is in immediate danger. In light of the exigency of the circumstances in these situations, generally notice is absolutely required. N.Y. JUD. LAW §§ 1022, 1024 (McKinney 1975) and N.Y. SOC. SERV. LAW § 417 (McKinney 1976). The advisory notes here suggest that in the case of parental abandonment no notice may be necessary, because requiring such notice would frustrate the act's purpose.

22. *See* Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1, 67 (1975) [hereinafter cited as Katz, Howe & McGrath].

23. *E.g.*, ILL. ANN. STAT. Ch. 37 § 701-20(1) (Smith-Hurd Supp. 1977). *But see* MD. SOC. SERV. CODE ANN. Art. 27 § 35A (1976) (within the discretion of the judge).

24. *E.g.*, ILL. ANN. STAT. Ch. 37 § 701-20 (Supp. 1977) (characterizing custody proceeding as non-adversarial); HAW. REV. STAT. § 571-41 (Supp. 1975).

25. *E.g.*, *In re* Johnson, 214 Kan. 780, 522 P.2d 330 (1974) (admission of hearsay evidence harmless). *See generally* KAN. STAT. § 38-817 (Supp. 1976). *Contra*, ILL. ANN. STAT. ch. 47, § 704-6 (Smith-Hurd 1972). *See also* N.Y. JUD. LAW § 624 (McKinney Supp. 1976-77) (evidence must be "material, competent and relevant").

26. *E.g.*, GA. CODE ANN. § 24A-2201(c) (1976); N.D. CENT. CODE § 27-20-29(c) (1974); TENN. CODE ANN. § 37-229(c) (1977).

27. *See, e.g.*, D.C. CODE § 16-2317(c)(2) (1973); Cotter v. Hunter, 540 P.2d 1159 (Okla. 1975) (civil burdens of proof apply in absence of statutory provision).

28. *E.g.*, COLO. REV. STAT. § 19-1-106 (1973).

If the welfare agency's petition is sustained and the child is temporarily removed from his parents' custody, a second hearing is set in which the parents' rights in the child are finally adjudged.[29] The period between this procedure, which will be referred to as the termination hearing, and the custody hearing varies. In some states it occurs immediately following the custody hearing.[30] Other states provide for a period between the two hearings in which the parents are given an opportunity to correct the conditions found to be deficient in the custody hearing.[31] During this interim, the activities of the parents are monitored by the welfare agency, which reports its findings for use in the termination hearing.[32]

The Termination Hearing

Like the custody hearing, the termination hearing is conducted in an informal, non-adversarial manner.[33] In order to permit the fullest disclosure of the parent-child relationship, the rules of evidence are relaxed.[34] Notice must be provided to the parents,[35] and their presence is ostensibly a prerequisite to termination.[36] Neither requirement may be rigidly insisted on, however, since abandonment is a sufficient

29. *See* N.Y. JUD. LAW § 611, 623 (McKinney Supp. 1976-77) (child must be found to be permanently neglected).

30. *See* N.Y. JUD. LAW § 625 (McKinney Supp. 1976-77) (termination hearing may occur immediately after custody hearing).

31. *See, e.g.*, OKLA. STAT. tit. 10, § 1130(A)(3)(c) (Supp. 1976), which allows the parent six months to correct improper conditions.

32. *E.g.*, COLO. REV. STAT. § 19-1-108 (1973); OKLA. STAT. tit. 10, § 1115 (Supp. 1976). In New York, where a termination disposition is set immediately after a custody hearing, evidence relating to the conduct of the parent after the filing of the petition is inadmissible. N.Y. JUD. LAW § 624 (McKinney Supp. 1976-77).

33. *See, e.g.*, IDAHO CODE § 16-2009 (Supp. 1976); ILL. ANN. STAT. § 701-20 (Smith-Hurd Supp. 1977).

34. *See* Jones v. Jones, 39 Ill. App. 3d 821, 350 N.E.2d 826 (1976) (hearsay evidence is admissible in a termination proceeding); N.Y. JUD. FAM. CT. ACT § 1046(b)(ii) (McKinney Supp. 1976-77) (only "relevant, competent and material evidence" is admitted); *In re* Blaine, 54 Misc. 2d 248, 282 N.Y.S.2d 359 (Fam. Ct. 1967) (judge has great discretion in admission of evidence).

35. *E.g.*, MISS. CODE ANN. § 43-21-13 (1972); W. VA. CODE § 49-6-2 (1976) (best notice possible). New York, as most states generally, handles the problem of abandonment by using every reasonable effort to contact the parents. N.Y. JUD. LAW § 1041 (McKinney 1975). *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972), *vacated and reversed on other grounds*, 414 U.S. 473 (1974). *See generally* Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950) (best possible notice is required for due process).

36. N.Y. JUD. LAW §§ 1041, 1042 (McKinney 1975). *See also In re* Ana Maria Q., 382 N.Y.S.2d 107 (App. Div. 1976). New York permits termination despite a parent's absence if that parent refuses to appear. N.Y. SOC. SERV. LAW § 384-b (McKinney Supp. 1976-77).

ground for termination.[37] While most states provide counsel for indigent individuals,[38] in many states appointment of counsel can be denied in the best interests of the child.[39] Even though the significance of the termination hearing is far greater than the custody hearing, only one state requires a greater burden of proof in this hearing than in the other.[40] In fact, many states rely on presumptions which encourage the termination of the parents' rights in their child.[41] Some states consider the trial court's finding of termination final, if there is no appeal taken on behalf of either the parent or the child.[42]

Almost every state provides for the termination of parental rights if conditions of neglect are still present at the time of the termination proceeding. Moreover, few states clearly permit other dispositions less radical than a complete severence of the parent child relation.[43] Indeed, few states address the question of alternatives to termination at all.

LESSER RESTRICTIVE ALTERNATIVES

The due process clause requires that states pursue courses of action which impinge on important rights as little as possible.[44] This aspect of due process, which will be referred to as the lesser restrictive alternatives doctrine, focuses on the means, rather than the ends, of state action. It allows a state to achieve its legitimate goals, but re-

37. *See, e.g.*, N.Y. JUD. LAW § 1024(b)(ii) (McKinney Supp. 1976-77) (best notice possible). The advisory notes on this subsection suggest that where parents may be unreachable, the state owes no further notice. *See* note 37 *supra.*

38. *E.g.*, MINN. STAT. ANN. § 260.155(2) (1971). *See also In re* Gault, 387 U.S. 1 (1967). *Contra*, ALAS. STAT. §§ 47.10.010-47.142 (1975); ARIZ. REV. STAT. §§ 8-531 to 8-544 (1973). *See also* n.23 *supra.*

39. *E.g.*, NEV. REV. STAT. § 128.100 (1975) (permissive appointment of counsel).

40. New York is perhaps the only state which increases the state's burden. Even so, this happens only where the cause for termination is mental illness. At that point, the burden shifts to clear and convincing proof rather than the normal civil standard of proof by a preponderance of the evidence. *See* N.Y. JUD. LAW § 1046(b)(i) (McKinney 1975); N.Y. SOC. SERV. LAW § 384-b(4)(c) (McKinney Supp. 1976-77). Furthermore, Professor Tribe suggests that the only standard consistent with protection of neglected and abused children is the preponderance standard. Tribe, 39 LAW & CONTEMP. PROB. 8, 11, 23 (Summer 1975).

41. *E.g.*, NEV. REV. STAT. § 128.095 (1975) (putative father presumed to have abandoned his child unless he makes an affirmative effort to appear at the termination proceeding); KY. REV. STAT. § 199.605 (Supp. 1976) (multiple illegitimate children prima facie evidence that parent is unfit).

42. *E.g.*, COLO. REV. STAT. § 19-3-1115(b) (1973).

43. *But see* OKLA. STAT. tit. 10, § 1137 (Supp. 1976). *E.g.*, NEV. REV. STAT. §§ 128.110, 128.120 (1975).

44. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973).

quires the state to act in ways that have minimal impact on important rights.[45]

Throughout its history, the test has been referred to by several labels. The term used herein was defined in *Shelton v. Tucker*:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of the least drastic means for achieving the same basic purpose.[46]

Recent cases have applied the same rationale under an overbreadth analysis.[47] Although these cases involve first amendment rights, they make clear that the justification for striking down the statutes involved was the same as that used in *Shelton*. Under an overbreadth analysis, statutes which prohibit or restrict expression that can be legitimately prohibited or restricted are declared unconstitutional if they also include other expressions that can not be justifiably restricted in their ambit.[48] Thus, as in the application of the lesser restrictive alternatives doctrine, the focus of the Court's review is the means used by states to achieve their legitimate goals.

In similar cases state statutes resting on irrebuttable presumptions have been struck down. Under this approach state statutes which base infringement of important rights on presumptions which deny individuals an opportunity to show that such infringement does not further the statute's legitimate goals are struck down.[49] As before, the state's goals are not impermissible; instead, the procedural and substantive means used to achieve them too greatly burden the right involved.[50]

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45. Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108, 1111 (1972); Wormuth & Mirkin, *The Doctrine of Reasonable Alternatives*, 9 UTAH L. REV. 245 (1964); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) [hereinafter cited as *Overbreadth Doctrine*].

46. 364 U.S. 479, 488 (1960) (footnotes omitted).

47. *E.g.*, Lewis v. New Orleans, 415 U.S. 130 (1974); United States v. Robel, 389 U.S. 258 (1967); Herndon v. Lowry, 301 U.S. 242 (1937). *But see* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

48. *Overbreadth Doctrine, supra* note 45.

49. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973).

50. *See* Vlandis v. Kline, 412 U.S. 441 (1973).

> [S]ince Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessary or universally true in fact, and when the State has *reasonable*

The very nature of the requirement of lesser restrictive alternatives assumes that a reasonable alternative to the presently burdensome state action exists. For this reason the requirement of lesser restrictive alternatives does not excessively frustrate the legitimate goals of the state. Because frustation of state goals is minimal, courts appear to be disposed to apply the test in a greater number of situations than other constitutional requirements.[51] In contrast to their hesitancy to require the showing of a compelling state interest to justify the infringement of a fundamental right, courts have required lesser restrictive alternatives in order to minimize the infringement of a wide range of rights, which have included economic,[52] as well as non-economic interests.[53] Thus, lesser restrictive alternatives should be required in termination and custody proceedings if the parental right can be shown to be important.

While the parental right is not mentioned in the Constitution and the Supreme Court has not yet held that the right is fundamental, the nature of the right itself and Supreme Court cases dealing with closely related rights suggest that it is entitled to constitutional protection. In *Roe v. Wade*,[54] the Supreme Court defined fundamental rights as those rights "implicit in the concept of ordered liberty."[55] In view of the

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alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates.

Id. at 452 (emphasis added). Department of Agriculture v. Murry, 413 U.S. 508 (1973) (Stewart, J., dissenting) (food stamp classification based on a "conclusive presumption" rather than "individualized determination" invalid when "Congress has *alternative means* available to it by which its purpose can be achieved.") (emphasis added).

51. *See* Comment, *Irrebutable Presumptions as an Alternative to Strict Scrutiny From* Rodreguez *to* LaFleur, 62 GEO. L.J. (1974).

52. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Railroad Co. v. Husen, 95 U.S. 465 (1878).

53. The following non-economic interests have been protected through a lesser restrictive alternative analysis. *Freedom of Religion*: Kunz v. New York, 340 U.S. 290 (1951); Martin v. Struthers, 319 U.S. 141 (1943); Cantrell v. Connecticut, 310 U.S. 296, 304 (1940) ("the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom [of religion]"). *Freedom of Expression*: Baird v. State Bar, 410 U.S. 1 (1971); Law Students Research Council v. Wadmond, 401 U.S. 154 (1971); Talley v. California, 362 U.S. 60 (1959); Saia v. New York, 334 U.S. 558 (1958). *Right to Travel:* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Shapiro v. Thompson, 394 U.S. 618 (1964). *Right to Vote*: O'Brien v. Skinner, 414 U.S. 524 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Carrington v. Rash, 380 U.S. 89 (1965). *Right to Procreate:* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Skinner v. Oklahoma, 316 U.S. 535 (1942).

54. 410 U.S. 113 (1973).

55. *Id.* at 152.

solicitude given a parent's right to control his child throughout the history of western civilization, particularly in England and the United States, it seems clear that the parental right is implicit in the concept of ordered liberty.[56]

This conclusion is further supported by recent Supreme Court cases which have protected rights related to marriage and the family. These rights have included the right of women to use contraceptives[57] and to have abortions.[58] Both of these cases can be seen as protecting an individual's right to determine the type of family he will have.[59] Also, the right of an expectant mother to continue teaching has been protected,[60] thus allowing an individual to have a family without penalty.

These cases protect the family primarily in the context of state sanctioned marriages, and thus might suggest that an independent parental right has not been recognized. However, the recent case of *Stanley v. Illinois*[61] rebuts this inference and suggests the importance of the family apart from marriage. In *Stanley,* an Illinois statute that created an irrebutable presumption that unmarried fathers were unfit parents of minor children was struck down. The Supreme Court reasoned that the presumption unjustifiably interfered with the father's parental right because it gave him no opportunity to show that the presumption was unwarranted in his particular case.[62] Thus, even though *Stanley* did not label the parental right fundamental, it established that it is an important right deserving constitutional protection. Further, *Stanley* demonstrates that because the parental right is important, the due process clause requires that the state protect the interests of children by means that interfere with the right as little as possible.[63]

56. *See* note 10 *supra.*

57. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

58. Roe v. Wade, 410 U.S. 113 (1973).

59. See note 57 *supra.*

60. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

61. 405 U.S. 645 (1972).

62. The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

Id. at 651, *quoting* Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

63. *See* Alsager v. District Court, 406 F. Supp. 10, 24 (S.D. Iowa 1975). *Cf.* Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) (lesser restrictive alternatives required in civil commitment of the mentally ill); Lessard v. Schmidt, 347 F. Supp. 1078 (E.D. Wis. 1972) (lesser restrictive alternatives required in civil commitment of the mentally ill), *vacated and rev'd on other grounds,* 414 U.S. 473 (1974).

LESSER RESTRICTIVE ALTERNATIVES TO THE TERMINATION OF PARENTAL RIGHTS

The parent's right to control his child is an important, if not fundamental right. As a result, the state can only protect the interests of neglected children and of society through means that affect the right as little as possible. In light of this limitation, how can the competing interests of the state and the parent be balanced?

State action in cases of parental neglect must be designed to avoid two extremes. One extreme is the state's abdication of its right to protect neglected children under the police power and the parens patriae power. As a practical matter, such a statute would reinstate the early common law view that the child is the absolute property of the parent.[64] Although not violative of the lesser restrictive alternative doctrine, such an extreme would ignore the rights of children and contradict modern conceptions of public policy.

Despite these problems, two jurisdictions make no provision for terminating the parental right in cases in which a child has been neglected.[65] To a lesser extent, seven states abdicate responsibility for the child's best interests by not providing for the transfer of legal custody of the child between the neglect hearing and the termination disposition.[66] While courts may terminate or transfer custody in the absence of a statutory provision, lack of statutory authorization clearly makes both actions more difficult.

At the other extreme, states could irrebuttably presume that once a child had been found neglected a parent could never provide proper care for his child. As indicated by *Stanley,* such a statute would clearly violate the lesser restrictive alternative doctrine. Even so, more than twenty states come dangerously close to this extreme by failing to require that questions of immediate custody and termination be decided in two separate proceedings.[67] Such a system completely ignores the

64. *See* note 10 *supra.*

65. *See* FLA. STAT. ANN. § 39.11 (West Supp. 1977); ARK. STAT. ANN. §§ 42-807 to 42-818 (Supp. 1975).

66. LA. CIV. CODE ANN. arts. 13:1600-13:1605 (West Supp. 1977); N.M. STAT. ANN. § 22-2-23 (Supp. 1975); N.D. CENT. CODE § 27-20-44 (1974); R.I. GEN. LAWS § 15-7-7 (Supp. 1976); S.C. CODE § 15-1095-36 (Supp. 1974); S.D. COMPILED LAWS ANN. § 26-8-36 (1976); TENN. CODE ANN. § 37-246 (Supp. 1976).

67. *E.g.,* MD. SOC. SERV. CODE ANN. § 35A (1976); NEV. REV. STAT. § 128.090 (1975). *Contra,* OKLA. STAT. tit. 10, § 1130 (Supp. 1976) (finding that child has been neglected required before state can begin termination proceedings). *See generally* Katz, Howe & McGrath, *supra* note 22, at 67.

possibility that once the parent is made aware of the improper conditions he will be able to correct them; the assumption has no support in each individual case.

Any satisfactory solution must avoid both extremes; it must permit the state to interfere with the parental right and, at the same time, insure that such interference occurs only when necessary. As has been suggested, this second requirement has not been fulfilled in the application of modern termination statutes. Rather than acting so that the particular conditions of each family are considered, termination proceedings tend to treat all family situations alike; serious cases of parental neglect and abuse are not distinguished from those that do not justify state intervention. Termination is sought in cases in which the child and society could be adequately protected through short-term removal of custody or the rehabilitation of the parent. This failure to restrict the parental right only insofar as is necessary is caused by three factors.

The first factor is the breadth of the statutory definitions of neglect. Such definitions bring more persons into the termination process than is justified in light of the purpose of the statutes.[68] These numbers make individual consideration and rehabilitation difficult. Moreover, attainment of these goals is not encouraged by the comparative costs of maintaining a neglected child at a state institution or treatment of the parents, and the costs to the state of terminating the rights of the natural parents in the child and putting him up for adoption.[69] Because the costs of termination are far less than those in rehabilitation, courts tend to resolve doubtful cases in favor of termination.[70] This tendency is not checked because of the last two factors: the absence of authority to dispose of neglectful parents other than by terminating their rights in the child, and the absence of procedural safeguards which insure that termination only occurs when justified. How each of these factors, which contribute to wholesale termination, should be constitutionally corrected is the subject of the next three sections.

Defining Neglect

Many of the problems caused by current statutes could be avoided

68. *See* note 14 *supra* and accompanying text.

69. For example, in 1972 it cost New York State a total of $122,500 to rear a child until age eighteen, compared to $25,560 for raising the same child as part of a normal family in foster care. D. FARSEL & E. SHINN, DOLLARS AND SENSE IN FOSTER CARE OF A CHILD: A LOOK AT THE COST FACTORS 20-21 (1972).

70. *Id.*

if the purposes of termination were clearer. Besides providing a logical basis for judicial action, a purpose clause would put the public on notice of the consequences of mistreatment of children. More importantly, in light of the modern tendency to terminate, termination statutes may be constitutional only if that tendency is counterbalanced by the recognition of family unity as a purpose of the statute along with protecting the best interests of the child.[71] Such an amended purpose clause would temper every provision of the statute and would clearly indicate an intention to terminate parental rights only as a last resort.

More specifically, the cases in which termination is justified should be enumerated. Even though precision may be inherently elusive,[72] neglect statutes should also attempt to distinguish various situations in which a child is found neglected but where dispositions other than termination are appropriate. Thus, conditions in which a child is not in immediate danger and when rehabilitation of the parents is possible are both factors that should be heavily emphasized in determining the appropriate disposition of children found to be neglected.

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71. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226 (Summer 1975) [hereinafter cited as Mnookin]. Aside from Alabama and Texas, which have no purpose clauses, the purpose of most state statutes is declared to be the protection of the best interests of the child and the public at large. Oklahoma's purpose clause is illustrative: "This Act['s] . . . . purpose [is] . . . : That the care and custody and discipline of the child shall approximate, as nearly as may be, that which should be given by its parents, and that, as far as practicable, any delinquent child shall not be treated as a criminal." OKLA. STAT. tit. 10, § 1129 (1971).

A small minority of states include the encouragement of family unity as one of its goals or characterize termination as a drastic step, to be used only as a last resort. An example of one such purpose clause, which minimizes infringement of the parental right, is that of Colorado:

> The general assembly declares that the purposes of this title are:
>
> (a) To secure for each child subject to these provisions such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society;
>
> (b) To preserve and strengthen family ties whenever possible, including improvement of home environment;
>
> (c) To remove a child from the custody of his parents only when his welfare and safety or the protection of the public would otherwise be endangered; and
>
> (d) To secure for any child removed from the custody of his parents the necessary care, guidance, and discipline to assist him in becoming a responsible and productive member of society.

COLO. REV. STAT. § 19-1-102 (1973). *See also* IDAHO CODE § 16-2001 (Supp. 1976). *See generally* Katz, Howe & McGrath, *supra* note 22.

72. *See* Mnookin, *supra* note 71, at 258: "[E]ven where a judge has substantial information about a child's past home life and the present alterations, present day knowledge about human behavior provides no basis for the kind of individualized predictions required by the best interests standard." *See also*, Freud, *Child Observation and Prediction of Development—A Memorial Lecture in Honor of Ernst Kris*, 13 THE PSYCHOANALYTIC STUDY OF THE CHILD 92, 97-98 (1958).

Alternative Dispositions

Assurance that termination occurs only when necessary could also be increased by specifically stating the alternatives other than termination that are available following a finding of neglect. Presently such alternatives which interfere with the parental right less than termination are not enumerated by the statutes.[73] In the absence of authorization, courts are reluctant to forge lesser restrictive protections of the child.[74] Thus, to diminish infringement of the parental right, statutes should specifically state that a court may, based on appropriate findings, authorize temporary removal of custody for the child until certain conditions are met or permit the rehabilitation of the parents while the child remains in their custody.[75]

Procedural Safeguards

To insure that the parental right is terminated only when required by the redrafted statute, both custody and termination hearings should be made adversarial.[76] In the absence of such a modification of termination procedures, the integrity of the fact finding process is compromised as a result of the state's economic interest in the proceeding. Such a change would require, among other things, recognition that the state's protection of the child under the parens patriae doctrine does not justify suspension of procedural rights recognized in other contexts,[77] such as the right to counsel. Without the presence of counsel, both the substantive and procedural protections of the statute may be easily undermined.[78] Similarly, evidentiary rules, jury trial and a right to appeal should be recognized as well.[79] In fact, the importance of the parental right suggests that greater safeguards should be required in neglect proceedings than in civil cases, including a more stringent burden of proof.

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73. *See* note 43 and accompanying text *supra.*

74. *See, e.g.,* Alsager v. District Court, 406 F. Supp. 10, 24 n.19 (S.D. Iowa), *rev'd in part,* 518 F.2d 1160 (8th Cir. 1975).

75. *See* Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976).

76. *Id.* at 778.

77. *Cf.* In re Ballay, 482 F.2d 648 (D.C. App. 1973) (*parens patriae* power insufficient to justify civil commitment on the basis of a preponderance of the evidence); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (requirements of due process not compromised in civil commitment proceeding under *parens patriae* power), *vacated and rev'd on other grounds,* 414 U.S. 473 (1974).

78. *See In re* Simeth, 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (1974).

79. *Cf.* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (normal evidentiary rules, right to jury trial and appeal required in civil commitment proceedings), *vacated and rev'd on other grounds,* 414 U.S. 473 (1974).

A stricter burden of proof is justified in neglect proceedings both because an important right is involved and because definitions of terminable neglect are inherently vague. Because precedent is of little value, adequate protection of the parental right requires that the decisionmakers be well convinced of the appropriateness of termination.[80] A stricter burden of proof is particularly justified in termination hearings.[81] In termination hearings, the state's interest in protecting the child is substantially lessened because the child is out of the parents' custody. On the other hand, the potential for infringement of the parents' rights has increased.

Not only should the state compensate for its tendency to terminate by improving the fact finding process, it should also permit a parent to correct the conditions justifying a finding of neglect. One way to provide this opportunity is by informing the parents of the specific conditions that were the basis of the finding of neglect.[82] Surprisingly,

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80. *See In re* Robert P., 61 Cal. App. 3d 310, 132 Cal. Rptr. 9 (Ct. App. 1976) (clear and convincing standard required in custody proceeding). *Contra, In re* J.R., 386 N.Y.S.2d 778 (1976).

Cf. In re Winship, 397 U.S. 358 (1970) (despite justification under the *parens patriae* power, incarceration under juvenile delinquency law must be justified by proof beyond a reasonable doubt); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (clear and convincing proof required for civil commitment).

> Because the stigmatization and loss of liberty attendant upon forced confinement are of the most profound consequence to the individual affected, due process demands that he be subjected to such disabilities only if the necessity for his commitment is proved by evidence having the highest degree of certitude reasonably attainable in view of the nature of the matter at issue. In a civil commitment proceeding, the questions involved are the *primarily subjective ones* of the subject's mental condition and the likelihood that he will be dangerous in the future. Such subjective determinations cannot ordinarily be made with the same degree of certainty that might be achieved where purely objective facts and occurrences are at issue. Consequently, the trier of fact nust be persuaded by clear, unequivocal, and convincing evidence that the subject of the hearing is in need of confinement under the minimum standards for commitment . . . .

Id. at 393 (emphasis added). The *Lynch* court's argument is especially compelling in the context of the termination of parental rights when considered along with a study in which three experienced juvenile court judges were given files concerning fifty actual families and asked if the parents' rights in their children should be terminated. In that study the judges agreed in less than one-half of the cases, and "[e]ven in cases in which they agreed on the decision, the judges did not identify the same factors as determinants, each seeming to rate to some extent within his own unique value system." Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. ED. REV. 620 (1973).

81. *See In re* S., 552 P.2d 584 (Or. Ct. App. 1976) (Schwab, Ch.J., specially concurring) (proof beyond a reasonable doubt should be required in termination hearing).

82. [T]he person whose freedom is subjected to a particular control is entitled to a responsive answer from the sovereign (as a matter of what I call "structural due process") when he asks *why the control has been imposed*, just as he is entitled to be told (as a matter of procedural due process) why the

states rarely require the finding of neglect to be explained and rarely tell the parents what they must do to correct the situation.[83]

Secondly, in order to make this information meaningful, custody and neglect hearings should be separated by a time period, specified in the custody order. Without two proceedings that are effectively separated, the state's interference with the parental right is not sufficiently minimized. In all probability, the state has protected both the child and the public through the custody hearing; if the child has been found neglected he will have been removed from the harmful situation. Termination will probably not further protect either the child or the state, and in fact may even harm both.[84] Thus, the state has little to gain through termination, except financial benefit, while the parents have much to lose. If the parents are given time to correct the conditions termed neglectful, and they do so, then the interests of the state, the parents and the child have all been served.

Unlike the present statutes which provide for separate proceedings, no absolute time limit should be set in which the termination hearing must be held. The time between custody and termination hearings should be that period reasonably necessary to correct the conditions found neglectful. For the opportunity to correct conditions amounting to neglect to be meaningful, the state should provide social workers to aid in correcting the problems found at the custody hearing. Other help should be provided to evaluate the aid given and the progress made.

CONCLUSION

Although not absolute, the parental right is clearly central to our social structure. However, laws designed to protect neglected and abused children often interfere with this right excessively in cases where the child could be protected through means less drastic than ter-

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control applies to him.
Tribe, *Three Linked Riddles*, 39 LAW & CONTEMP. PROB. 8, 23 (Summer 1975).

83. *See* Katz, Howe & McGrath, *supra* note 22, at 61-63. *But see* IOWA CODE ANN. § 600A.9(c) (West Supp. 1976).

84. *See* Juvenile Dep't v. Wade, 19 ORE. APP. 314, —, 527 P.2d 753, 763 (1974); J. GOLDSTEIN, A. FREUND, A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). Kay & Phillips, *Poverty and the Law of Child Custody*, 54 CAL. L. REV. 17 (1966); Tamalia, *Neglect Proceedings and the Conflict Between Law and Social Work*, 9 DUQ. L. REV. 579, 588 (1971).

mination. As a result, termination laws appear to be unconstitutional in light of the lesser restrictive alternatives doctrine. In order to correct this problem, termination statutes should be modified to make the process responsive to the particular needs of the parents, the child and society in each case.

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